APR 21 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1305

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTRANIK PAROUTIAN,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT J. CARLUCCIO,
Counsel for Petitioner,
150 Broadway,
New York, New York, 10038.

Adams Press Corp., 180 Cedar Street, N. Y.—Beekman 3-1050-51

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	16
Appendix:	
A—Statutes Cited	1a
B—Opinion of the United States Court of Appeals for the Third Circuit	2a

Cases Cited

Benedictine Society v. National City Bank of New York, 109 F. 2d 679 (1940)	9
Cantwell v. Connecticut, 310 U. S. 296	15
Carnely v. Cochran, 369 U. S. 506 (1962)	12
Chicago B & Q R. Co. v. City of Chicago, 166 U. S. 226	15
Crane Co. v. James McHugh Sons, 108 F. 2d 55	9
Dayton Bread Company v. Montana Flour Mills Co., 126 F. 2d 257 (1942)	9
Escobedo v. Illinois, 378 U. S. 478 (1964)	12-15

PAGE

Fay v. Nois, 372 U. S. 391 (1963) 6, 12, 14

Gideon v. Wainwright, 372 U. S. 335 (1963) 6, 14, 15

Gitlow v. New York, 268 U. S. 652 15

Griffin v. California, 380 U. S. 609 15

Griswold v. Connecticut, 381 U. S. 478 15

Hamilton v. Alabama, 368 U. S. 52 14

Haynes v. Washington, 373 U. S. 803 7

Hunt v. Warden, 335 F. 2d 936 (1964) 12

Johnson v. State of New Jersey, —— U. S. —— No. 762, October Term, 1965 13

Johnson v. Zerbst, 304 U. S. 458 (1938) 12, 13

Linkletter v. Walker, 381 U. S. 618 (1965) 13

Lyles v. Beto, 379 U. S. 649 (1964) 13

McLeod v. Ohio, 381 U. S. 336 (1964) 13

McNabb v. U. S., 318 U. S. 332 6

Malloy v. Hogan, 378 U. S. 1 15

Mapp v. Ohio, 367 U. S. 643 (1961) 13

Miranda v. Arizona, —— U. S. ——, No. 759 October Term, 1965 ..... 6, 13

People v. Bodie, 16 N. Y. 2d 275 (1965) 10

People v. Davis, 13 N. Y. 2d 353, 241 N. Y. S. 172 11

People v. Meyer, 11 N. Y. 2d 162, 227 N. Y. S. 2d 427 11

People v. Robinson, 13 N. Y. 2d 296, 246 N. Y. S. 2d 623 (1963) 11

PAGE

People v. Rodriguez, 11 N. Y. 2d 279, 229 N. Y. S. 2d 353 11

People v. Waterman, 9 N. Y. 2d 561 ..... 11, 16

Pointer v. Texas, 380 U. S. 400 15

Powell v. Alabama, 287 U. S. 45 14

Robinson v. California, 370 U. S. 660 15

Spano v. New York, 360 U. S. 315 (1959) 5-7

U. S. v. Massiah, 377 U. S. 201 (1964) 6, 7, 9, 10, 12-14

U. S. v. Sherman, 336 U. S. 369 (1956) 8, 9

White v. Maryland, 373 U. S. 59 14

Wolf v. Colorado, 338 U. S. 25 15

United States Constitution Cited

Fourth Amendment 2

Fifth Amendment 2

Sixth Amendment 2, 8, 9

Ninth Amendment 2, 15

Statute Cited

28 U.S.C. 1254 (1) 2

Rule Cited

Supreme Court Rule 19-1 (a) (b) 2

IN THE

Supreme Court of the United States

October Term, 1966

No.

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTRANIT PAROUTIAN,

Petitioner.

BRIEF FOR PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 3, 1967 affirming the conviction of Petitioner Antranik Paroutian.

Opinion Below

The opinion of the Court of Appeals (Appendix B) is unreported to date.

Jurisdiction

The judgment of the Court of Appeals was filed on January 3, 1967. An extension for time within which to file a Petition for a Writ of Certiorari was duly filed and an an extension was granted by Order, to and including April 21, 1967 by Mr. Justice John M. Harlan. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Supreme Court Rule 19-1 (a) and (b).

Questions Presented

1. Whether, when a defendant (1) under indictment (2) after preliminary examination and (3) has retained counsel, direct contact is made between the government and the defendant with design to acquire and eventually acquiring inculpatory statements, whether this conduct violates defendant's Constitutional right of counsel, U. S. Constitution Amendment VI.

2. Whether, when such direct contact came by way of a cellmate, who in addition was a Brazilian Attorney, who pumped the defendant for admissions and confessions, then this type of clandestine custodial interrogation violates the standards of fundamental fairness, so that any evidence relating to these conversations deprived the defendant of a fair trial, to say nothing of the violation by the Government of defendant's right against self-incrimination and due process, under U. S. Constitution Amendments V, VI and IX together with the spirit of unlawful search and seizure prohibitions under Amendment IV.

Statutes Involved

United States Constitution Amendments VI, V, IV and IX have pertinent parts reprinted in Appendix A. They pertain to right of counsel, self-incrimination, due process, search and seizure, and fundamental unenumerated rights respectively.

Statement

Petitioner was arrested on June 8, 1960.

Petitioner retained counsel on June 8, 1960.

Petitioner was arraigned on June 9, 1960.

Petitioner was indicted on June 9, 1960.

On June 22, 1960 Luiz De Almeida, a Brazilian lawyer, who on the previous day had been arrested, was interned in the same cell as the petitioner.

For approximately twenty-seven days thereafter the petitioner and the Brazilian lawyer were cellmates. After this period of time the cellmate De Almeida testified that he wished to confess his own crimes to the United States government.

He went to the Federal Agents, "very desperate and crying" made a clean breast of it all, "begged for leniency," stated he would be at the "complete disposal of the Bureau," and then discussing the petitioner said to the United States Agents:

> (Questions by United States Attorney and Response)
>
> "A. They (the government) asked me many questions about my case, which was cocaine, and then I told them that I am making—met a man in prison, a man with the name of Paroutian who had a case with heroin and that I could furnish, give them some information on that case if they wanted.
>
> Q. Did you offer to cooperate with the Bureau of Narcotics on this occasion? A. Yes.
>
> Q. And what did they say, if anything, to you when you offered to cooperate? A. Yes, they would appreciate that.

Defendant's Counsel: They would what?
The Interpreter: 'Appreciate.'"

The informer, during the same line of questioning, stated that on this initial interview he told the government no more about the petitioner. The informer continued that, he was returned to Paroutian's cell. Later the informer returned to the government approximately one day (24 hours) hence or so, and told a complete narrative about the alleged criminal admissions and activities of the petition. De Almeida's testimony alone, ultimately convicted the petitioner.

In the words of the United States Attorney asking for leniency for this Brazilian lawyer-informer, the government represented to the Court, "but for this man's testimony, Perujian (Paroutian) would have gone free and it was his testimony that *nailed down* and corroborated each and everything that the government sought to prove. I must again stress this man's offer of complete cooperation *prior* to the Perujian (Paroutian) affair." (Emphasis ours.)

For his action in helping the government, "appreciation" he did receive. On November 18, 1960, in another adjoining District, the Southern District of New York, Luiz De Almeida, the Brazilian lawyer, pleaded guilty to smuggling 1 pound of cocaine into the United States. He received a complete suspended sentence with one day's probation, in order to, and on the condition that he depart forthwith to Brazil.

The informer's uncorroborated, strongly contradicted position was, that the information he gleened from the petioner was not obtained during the 24 hour hiatus, *i.e.* from the time the government said "they would appreciate that" and then returned him to his cell and the following day.

The informer says he obtained these statements from the petitioner voluntarily during his previous 27 day incarceration with the petitioner.

Petitioner is presently incarcerated for a 20 year jail term. It is his first and only offense. He is a citizen of France and his relatives in Europe are financing his appeal.

Reasons for Granting the Writ

1. There is a direct conflict between the decision of the instant case and the decisions of the Supreme Court.

In *Spano* v. *New York*, 360 U. S. 315 (1959), a State Criminal conviction was reversed on the ground that a confession, which had been admitted into evidence, was coerced as a matter of law. Four judges expressed the theory that the right to counsel must be recognized and enforced not only by the courts, but also by the representatives of government which is clearly enunciated at pp. 325-26:

> "Depriving a person, formally charged with a crime of counsel, during the period prior to trial may be more damaging than denial of counsel during the trial itself and such deprivation after indictment and before trial may indeed be tantamount to the denial of effective representation by counsel at the only stage where legal aid and advice would help him."

These four justices agreed that the inadmissibility of this evidence was based not on the element of coercion, but was based on the interrogation of defendant by the police in the absence of defendant's counsel, *Spano* v. *New York*, *supra*, at pp. 324 through 326.

In *U. S.* v. *Massiah,* 377 U. S. 201 (1964), the Supreme Court affirmed the *Spano* doctrine by stating:

> "We hold the petitioner was denied by the basic protections of that guarantee (Sixth Amendment right to counsel) when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him *after he had been indicted and in the absence of counsel.*" (Emphasis ours and parenthetical statements ours.)

In his dissenting opinion in *U. S.* v. *Massiah,* 307 F. 2d 627, which was later cited with approval by the Supreme Court in *U. S.* v. *Massiah, supra* in the majority opinion, Judge Hays asserted that it is reasonable to assume that federal officers to gain information (after defendant had been indicted) must deal through and not around an attorney retained by a defendant." This is especially true in light of the fact that a stricter standard of conduct is imposed by federal courts upon federal law enforcement officials than is imposed upon their state counterparts. See *McNabb* v. *U. S.,* 318 U. S. 332, 340 (1943); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

In fact, the rationale of placing curbs on police investigation is to safeguard the rights of a person suspected or accused of a crime from the compelling pressure which works to undermine the individual's will to resist, and to compel him to speak where he would not otherwise do so freely. To thwart these compelling pressures, the Supreme Court before *Escobedo* v. *Illinois,* 379 U. S. 478 and *Miranda* v. *Arizona,* No. 759, October Term 1965 — U. S. — employed the standard of voluntariness on the issue of confessions, *Fay* v. *Noia,* 372 U. S. 391 (1963) and this volun-

tary standard takes into specific account the failure to advise accused of his right to counsel. *Haynes* v. *Washington*, 373 U. S. 803; *Spano* v. *N. Y., supra.*

It is respectfully submitted in the immediate case that the federal agents violated the post indictment standard of gaining information by working around and not through counsel. This violation occurred when the federal agents sent De Almeida back into the cell to gain more information from Paroutian. The agents should have given Paroutian an opportunity to waive counsel by advising him of his right to counsel *or taking Paroutian's confession with counsel present.* Massiah, Spano and the New York Court of Appeals demand that this practice be followed or else these remarks are inadmissible.

2. Also the petitioner respectfully contends that, the failure of the federal agents to take any statements from De Almeida about Paroutian on the day that De Almeida volunteered this information, was an attempt to confuse and mislead the evidence. This failure to elicit Paroutian's "confession" enabled the government to draw a tenuous distinction of agency which tainted all of De Almeida's testimony since it afforded De Almeida too much discretion as to what evidence was obtained while De Almeida was a special agent of the government.

Also, petitioner contends that the very act of the federal agents not taking Paroutian's alleged confession and sending De Almeida back to the cell to acquire more information from Paroutian, was a surreptitious attempt to "deliberately elicit" incriminating remarks from defendant Antranik Paroutian after Paroutian was indicted. This type of police action is exactly what *U. S.* v. *Massiah, supra*, forbids and the entire confession should be inadmissible.

3. Furthermore, petitioner contends that Federal Agents indirectly violated Massiah by drawing superficial distinctions of agency. By claiming that De Almeida was not a special agent while he was surreptitiously interrogating Paroutian, the government had done indirectly what Massiah directly forbids. *U. S.* v. *Sherman,* 356 U. S. 369 (1956), asserts the government cannot:

> "Disown an informer and insist it was not responsible for his actions in order to avoid defense of Entrapment."

Accordingly, the government should not be able to disown De Almeida's surreptitious questioning in order to avoid violation of Sixth Amendment. In fact the government encouraged De Almeida's questioning by saying that they would "appreciate" any information about Antranik Paroutian.

Moreover, the petitioner respectfully contends that although De Almeida might not have been an authorized agent of the government, there is enough evidence to indicate that he had the intention of acting on behalf of the government while he was questioning Paroutian. From the facts of the case it was shown: De Almeida was a Brazilian lawyer with a knowledge of United States law and procedure, he had confessed to his crime; he was "very desperate and crying" when he was incarcerated with Paroutian; he wanted to "make amends to the government"; Luiz De Almeida stated that he would be at the "complete disposal" of the bureau and would travel to any country or state as directed by the bureau and would travel with any agent.

At his first opportunity, he voulnteered all the information he had about Paroutian and he was given a feather

light sentence on all charges against himself. This surreptitious questioning while petitioner had counsel by this quasi agent is a violation of the Sixth Amendment according to *Massiah, supra.* Again the government should not be able to disown an agent to avoid defense of violation of Sixth Amendment, *Sherman, supra.*

4. The petitioner also respectfully contends that De Almeida became a special agent of the government before he volunteered his information, by ratification. In *Dayton Bread Company* v. *Montana Flour Mills Co.*, 126 F. 2d 257, the court said:

> "Acceptance of a benefit flowing from an unauthorized act amounts to an implied ratification of such act whether such principal intends to ratify or not, but before such rule is applicable, acts of an agent in excess of his authority must be brought home to the principal."

In accord, *Crane Co.* v. *James McHugh Sons,* 108 F. 2d 35, and *Benedictine Society* v. *National City Bank of New York,* 109 F. 2d 679. In the present case there is a clear ratification. Since De Almeida had already confessed to his crime and put himself at "the Bureau's complete disposal" he was to some extent an agent of the government. He probably exceeded his authority by questioning Paroutian, but the government certainly ratified this act by using De Almeida's testimony at Paroutian's trial. The government even provided a consideration or *quid pro quo* for De Almeida, by procuring a suspended sentence and one (1) day's probation for him on the charges against him.

Petitioner respectfully contends that petitioner's failure to take the stand, which was in accord with his constitutional rights, bolstered the credibility of Luis De Almeida,

informer, and the admission of this evidence in effect circumvented petitioner's rights against self-incrimination. Unlike an eyewitness where cross examination can reveal contradictions between the witness's and other witnesses's description of a physical occurrence, cross examination of an informer's testimony can only reveal contradictions in his testimony. Since the petitioner admits that Luiz De Almeida had access to petitioner's indictment, which in turn corroborated Luiz De Almeida's statements, petitioner contends that only proof of the validity of this confession was Luiz De Almeida's testimony that the conversation took place.

The highly questionable testimony of Luiz De Almeida should not prove its own validity. Moreover, to refute effectively the informer's accuracy as to what transpired in the cell and whether there was coercion in obtaining this testimony, Antranik Paroutian had to take the stand. This type of testimonial compulsion is precisely what the Supreme Court was trying to obviate in *U. S.* v. *Massiah, supra* by departing from the voluntary standard for confessions and substituting the concept that once a defendant is indicted any confession must be made in the presence of counsel or with an effective waiver of counsel.

5. It should be also noted well, that, the New York Court of Appeals, has followed the Spano doctrine to its logical end. This court renders inadmissible all statements made by an accused after commencement of formal criminal proceeding, either by arraignment or indictment, where counsel was not present. The reason for eliminating this evidence, according to the New York Court of Appeals, is that this evidence is obtained by testimonial compulsion which is in violation of petitioner's constitutional right to counsel. In *People* v. *Bodie*, 16 N. Y. 2d 275, the court

asserted that an inculpatory statement made in absence of counsel after an information had been filed is inadmissible. In accord, *People* v. *Davis,* 13 N. Y. 2d 353 (1962), 241 N. Y. S. 2d 172 (1963); *People* v. *Rodriguez,* 11 N. Y. 2nd 279, 183 N. E. 2nd 651, 229 N. Y. S. 2nd 353 (1962); *People* v. *Meyer,* 11 N. Y. 2d 163, 182 N. E. 2nd 103, 227 N. Y. S. 2nd 427.

In *People* v. *Waterman,* 9 N. Y. 2nd 561, at 75 (1961) the Court of Appeals stated:

> "Any secret interrogation of defendant from and after the finding of the indictment without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."

In *People* v. *Robinson,* 13 N. Y. 2nd 296, 246 N. Y. S. 2d 623 (1963), the Court of Appeals reversed a conviction because of post arraignment statements made in absence of counsel. The facts of Robinson are very similar to those of the immediate case. In Robinson, defendant had been incarcerated in cell next to an acquaintance. During their detention defendant made several incriminating remarks to this man, and later the acquaintance became a special agent of the police. The Court of Appeals reversed the conviction and would not admit any of the incriminating statements made to the informer *before* he became a special agent of the police. According to the Court, these remarks were *too prejudicial and post arraignment statements in absence of counsel are inadmissible.*

6. Petitioner did not waive his right to counsel.

According to *Escobedo* v. *Illinois*, 378 U. S. 478 at 486:

> "When the investigation of a crime reaches an accusatory stage a man who is being questioned needs counsel."

Escobedo, supra, also states that a man can still waive his right to counsel once the accusatory stage has been reached. The standard for determining this waiver is clearly a federal standard. *Fay* v. *Noia*, 372 U. S. 391, 439 (1963); *Hunt* v. *Warden*, 335 F. 2nd 936, 944 (4th Cir. 1964). Simply, the federal standard is "an intentional relinquishment or abandonment of a known right or privilege" . . . *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). In recent years the Supreme Court has explained and clarified this standard:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows that accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."
>
> *Carnely* v. *Cochran*, 369 U. S. 506, 516 (1962).

It is respectfully submitted that petitioner, Paroutian, had retained counsel and that he had not made any intentional or intelligible waiver of this right prior to his conversation with Luiz De Almeida. Finally, the government has not met the necessary requirements to demonstrate this waiver since the devious methods employed by the government and its agents made intelligible waiver an impossibility.

7. The Massiah doctrine is retroactive.

In *Johnson* v. *State of New Jersey,* No. 762, October Term 1965, U. S. Supreme Court held that *Escobedo* v. *Illinois,* 378 U. S. 478 (1964) and *Miranda* v. *Arizona, supra,* are not retroactive. Absent from this opinion is any mention of any non-retroactivity of *U. S.* v. *Massiah,* 377 U. S. 201. On the contrary, on two occasions in *McLeod* v. *Ohio,* 381 U. S. 356 and *Lyles* v. *Beto,* 379 U. S. 648, the Supreme Court has applied the Massiah doctrine retroactively. *Lyles* v. *Beto, supra* is very similar to the case in question. The defendant was indicted in 1961 and after indictment and a warning he made incriminating remarks, but these remarks were made in absence of counsel. In an appeal from a denial of *habeas corpus,* the Supreme Court reversed defendant's conviction, citing Massiah as controlling at 279 U. S. 648.

Looking at the *Johnson* opinion itself, one sees that the Supreme Court in determining retroactivity was doing so "by looking to the peculiar traits of the specific rule in question," at p. 8. In *Linkletter* v. *Walker,* 381 U. S. 618 at 639 (1965), the Supreme Court found that one reason why *Mapp* v. *Ohio,* 367 U. S. 643 (1961) was not retroactive was that the Mapp rule did affect evidence "the reliability and relevancy of which is not questioned." In Johnson the Supreme Court also states: "Retroactive application was justified because the rule affected 'the very integrity of the fact finding process.'"

It is respectfully submitted that procedure employed by federal agents and Luiz De Almeida affected the reliability of this evidence by affording Luiz De Almeida too much discretion as to what was said before and after he became a special agent of the government. Also the integrity of the fact-finding process was adulterated by the federal agents working around counsel instead of through

counsel once the petitioner had been indicted. Finally, *Gideon* v. *Wainwright*, 372 U. S. 335, which was held to be retroactive, stated that defendant should have counsel at every important stage of the criminal proceedings and petitioner contends that since he was denied this same right, violation of this right should have retroactive effect.

The argument in the instant case is based upon Massiah principles. The *Massiah* case is based upon *Gideon, Powell and Hamilton* v. *Alabama, infra* and *White* v. *Maryland, infra,* principles, which have "been broadly reaffirmed by this Court" in *Massiah* v. *U. S.*, 377 U. S. 204 the court said:

> "(4) This view no more than reflects a constitutional principle established as long ago as Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, where the Court noted that '* * * during perhaps the most critical period of the proceedings * * * that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation (are) vitally important, the defendants * * * (are) as much entitled to such aid (of counsel) during that period as at the trial itself.' Id., 287 U. S., at 57, 53 S. Ct., at 59, 77 L. Ed. 158. And since the Spano decision the same basic constitutional principle has been broadly reaffirmed by this Court, Hamilton v. Alabama, 368 U. S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114; White v. Maryland, 373 U. S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193. See Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799."

These principles undoubtedly affect the integrity of the fact finding process, the fundamental rights of persons charged with crime together with fundamental fairness.

8. The conduct of the government violated the rights retained by petitioner under the Ninth Amendment.

Justice Goldberg in his concurring opinion in *Griswold* v. *State of Connecticut*, 381 U. S. 479, 488, 85 S. Ct. 1678, 1683 stated that:

> ". . . there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."

As supporting authority for the doctrine of fundamental though unenumerated rights, he cites:

Chicago B & Q R. Co. v. *City of Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979;
Gitlow v. *New York*, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138;
Cantwell v. *Connecticut*, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213;
Wolf v. *Colorado*, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782;
Robinson v. *California*, 370 U. S. 660, 82 S. Ct. 1417, 8 L. ed. 2d 758;
Gideon v. *Wainwright, supra;*
Malloy v. *Hogan*, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653;
Pointer v. *Texas*, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923;
Griffin v. *California*, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106.

He further states that the standards for determining these fundamental rights are the "traditions and collective conscience of our people." *Griswold* v. *Connecticut*, *supra*, at 493.

People v. *Waterman, supra* saw fair conduct of the government in a criminal case as a "fundamental right," even though not an enumerated one.

CONCLUSION

The very act of federal agents in not taking petitioner's alleged confession and sending the informer back to the cell to acquire more information from Paroutian, was a surreptitious attempt to "deliberately elicit" incriminating remarks. This type of police action violates the spirit and intent and prohibition of the Massiah decision. It violates Paroutian's right of counsel, the constantly evolving concept of due process and basic principles of fundamental fairness and other constitutional rights.

It is therefore respectfully submitted that this petition for certiorari be granted.

Respectfully submitted,

ROBERT J. CARLUCCIO,
Attorney for Petitioner.

APPENDIX A

Statutes Cited

UNITED STATES CONSTITUTION AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION AMENDMENT V:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

UNITED STATES CONSTITUTION AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION AMENDMENT IX:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

APPENDIX B

The Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 134 —September Term, 1966

(Argued October 19, 1966 Decided January 3, 1967)

Docket No. 30476

ANTRANIK PAROUTIAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

WATERMAN, HAYS AND ANDERSON,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, Judge, dismissing appellant's application for a writ of habeas corpus.

Affirmed.

ROBERT J. CARLUCCIO, New York, N. Y. for Appellant.
GEORGE L. BARNETT, New York, N. Y. (Joseph P. Hoey,

Appendix B

United States Attorney for the Eastern District of New York, on the brief), for Appellee.

HAYS, Circuit Judge:

This is an application by a federal prisoner for a writ of habeas corpus. The district court properly treated the application as a motion under 28 U.S.C. 2255. See Ray v. United States, 295 F. 2d 416 (10th Cir. 1961), cert. denied, 369 U. S. 875 (1962). We affirm the district court's denial of the motion.

Appellant was convicted of dealing in narcotics in violation of 21 U.S.C. 174. The conviction was affirmed, 319 F. 2d 661 (2nd Cir. 1963), cert. denied, 375 U. S. 981 (1964).

While appellant was incarcerated in the Federal House of Detention in New York City awaiting trial he shared a cell with one Luis De Almeida who was held on an entirely unrelated charge. De Almeida told the Federal authorities that appellant had made several incriminating statements to him and offered to testify against appellant. Appellant now contends that De Almeida's testimony should have been excluded. He argues that the government's use of this testimony deprived him of his Sixth Amendment right to counsel since, although he had already been indicted and had retained counsel, the incriminating statements to which De Almeida testified were made in the absence of counsel. For the proposition that under these circumstances the evidence of incriminating statements was inadmissible, appellant cites United States v. Massiah, 377 U. S. 201 (1964).

Appendix B

But in Massiah the Court said:

> "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial." 377 U. S. at 207.

As we read Massiah the decision turns upon the fact that the situation in which Massiah made the admissions introduced against him constituted "interrogation by a government agent," 377 U. S. at p. 206, and was the equivalent of "interrogation by the police," 377 U. S. at p. 204.

In the present case the trial court examined the evidence as to the admissibility of De Almeida's testimony and expressly found that the government did not assign De Almeida to appellant's cell and that appellant's admissions to De Almeida were voluntarily made. We accept these findings. It is clear that De Almeida was not a government agent at the time that appellant made the incriminating statements to which De Almeida testified and that appellant was not subjected to interrogation.

We are certain that in deciding Massiah, the Supreme Court did not intend to hold that all those to whom indicted persons made admissions become ipso facto government agents and that nobody to whom defendants in criminal cases make incriminating statements can testify to those statements unless counsel was present when the statements were made.

Appendix B

The basic purpose of the holding in Massiah was to prevent the government's interrogating persons under indictment who had already retained counsel, in the absence of their counsel. The requirement of the presence of counsel whenever indicted persons talk indiscreetly to third parties could not have been in the Court's mind and would not contribute to the accomplishment of its purpose.

In view of the reasoning by which we have reached our decision, it is unnecessary for us to pass upon the issue of the retroactivity of the Massiah case.

Affirmed.